

## FLEXIBILITIES FOR DEVELOPING COUNTRIES IN THE DOHA ROUND AS À LA CARTE SPECIAL AND DIFFERENTIAL TREATMENT: RETRACING THE URUGUAY STEPS?<sup>(\*)</sup>

Juliana Peixoto Batista<sup>(\*\*)</sup>

**Resumen:** Las tensiones crecientes al interior de la Organización Mundial de Comercio — OMC tienen causas internas y externas como por ejemplo la crisis financiera internacional, los cambios en la configuración de poder mundial y una suerte de intensificación del conflicto Norte-Sur entre los miembros del sistema multilateral de comercio, sobretudo después de la Ministerial de Cancún y la creación del Grupo de los 20. La OMC refleja en gran medida esos cambios y es de hecho, la primera en hacerlo, teniendo en cuenta que es el más transparente de los organismos multilaterales y el más “fiscalizado” por sus miembros. Sin embargo, la OMC es sólo el canario que en las minas anuncia la falta de oxígeno: muestra como una serie de organismos resultan caducos en este nuevo escenario. Allí, los países en desarrollo vienen logrando trabar muchas iniciativas de los países desarrollados por considerar que no responden a sus intereses y estrategias de desarrollo. Países como Brasil e India están expandiendo sus papeles en cuanto jugadores globales, *process drivers*, al tiempo que crece la heterogeneidad en el grupo de países en desarrollo. En ese contexto, las discusiones acerca de las flexibilidades para países en desarrollo en la OMC siguen siendo válidas. En ese contexto, este trabajo se propone dos objetivos estrechamente relacionados. Por un lado, identificar como viene siendo abarcado el TE&D en el sistema multilateral, desde su creación en el GATT hasta las actuales negociaciones en Doha. Por otro lado, identificar cómo se han posicionado en ese contexto países en desarrollo de nivel medio que participan activamente en coaliciones como Brasil, Argentina o India. Se sostiene que el TE&D viene siendo restringido para tornarse un espacio de flexibilidad para países menos adelantados, mientras que los demás países en desarrollo siguen buscando bajo otros títulos nuevas flexibilidades que entienden necesarias en el sistema multilateral de comercio desde su perspectiva de desarrollo.

**Palabras-clave:** Tensiones Norte-Sur, Países en Desarrollo, Trato Especial y Diferenciado, Organización Mundial de Comercio, Ronda de Doha.

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(\*\*) Lawyer, Master in International Relations. She is currently a researcher at the Latin American School of Social Sciences — FLACSO (Argentina) and coordinates the Latin American Trade Network — LATN. *E-mail:* [jpeixoto@flacso.org.ar](mailto:jpeixoto@flacso.org.ar). Recebido em: 21.4.2010 e aceito em: 24.5.2010.

**Abstract:** The current tensions within the WTO have many external and internal causes, such as the global crisis, changes in the global power balance, and the revival of North-South conflict, mostly after the Cancun Ministerial and the creation of the G-20. The WTO, to a large extent, reflects those changes, mainly given that it is the most transparent of all multilateral organizations, and it is also the most accountable to its members. However, the WTO is only the canary in the coal mine that announces the lack of oxygen: it shows how multilateral organizations are obsolete in this current transition phase towards a new global scenario. In fact, developing countries have blocked many developed countries' initiatives in the WTO, by considering them unlikely to respond to their development interests. Countries such as Brazil and India have been increasingly expanding their roles as process drivers in the international level, while the differentiation within the group of developing countries increases. In this context, discussions around flexibilities for developing countries in the WTO are still valid, whether we call them Special and Differential Treatment (S&DT), less than full reciprocity, whether they are discussed in specialized committees or in the Committee of Trade and Development. The goal of this paper is twofold: in one hand, to look for answers about how the S&DT has been approached in the Doha Development Agenda; on the other hand, to identify how middle income developing countries actively participating in coalitions have positioned themselves in order to search for new flexibilities they see as necessary in the multilateral trading system from their development perspective.

**Keywords:** North-South Tensions, Developing Countries, Special and Differential Treatment, World Trade Organization, Doha Round.



## INTRODUCTION

The current tensions in the search for flexibilities for developing countries in organizations such as the WTO is part of the historical North-South conflict, how this conflict has been fluctuating through time due to changes in the world power balance, as well as the increasing heterogeneity within developing countries group.

Developing countries have blocked some of the initiatives of developed countries, believing that they fail to consider their interests<sup>(1)</sup>. Additionally, although emerging countries — such as Brazil or India — still lag behind the so-called “developed” countries, they are increasingly participating in the decisions of important international organizations such as the IMF, OECD, and the financial G-20. In other words, they are starting to move away from the position of rule takers or rule breakers within the international scenario, to play an increasingly important role as rule makers<sup>(2)</sup> — at a regional level, and process drivers at the global level<sup>(3)</sup>.

In these times of change in the configuration of the international community, the development agenda and its search for flexibilities is more relevant than ever before and adopts many forms in different environments. In fact, if the WTO’s agenda on Special and Differential Treatment (S&D) is held up, countries then search for other ways to move on under different names but with the same substantial objective: obtaining the flexibilities they seem necessary in the international environment.

In that context, this paper has two closely intertwined objectives. On one hand, to identify how S&D has been dealt with in the multilateral system, from its inception under GATT to the present negotiations in Doha. On the other, to identify how middle income<sup>(4)</sup> developing countries actively participating in coalitions have positioned themselves, as in the case of Brazil, Argentina, India, South Africa. What we see is that the S&D is being restricted to be turned into flexibility room for LDCs, while other developing countries continue searching — under other names — for new flexibilities they see as necessary in the multilateral trading system from their development perspective.

The first section will offer a brief historical overview on Special and Differential Treatment, from its beginnings under GATT to the present day, analyzing it in the light of the WTO’s North-South conflict. The second section will analyze the S&D evolution on specific issues, *i.e.* subsidies (Agreement on Subsidies and Countervailing Measures), investment (Agreement on Trade-Related Investment Measures), and intellectual property (Agreement on Trade-Related Aspects of Intellectual Property Rights). The third section will provide a summary of the main roads followed by several developing countries to move forward in the search for flexibilities in the Doha negotiations. At the end, some conclusions will be provided.

(1) See Shadlen (2009).

(2) About these categories, see S. Krasner (1977, p. 635-671).

(3) See D. Tussie (2009).

(4) We consider middle income countries those comprised within the World Bank range of lower and upper middle income countries.

## SPECIAL AND DIFFERENTIAL TREATMENT AT THE HEART OF THE NORTH-SOUTH CONFLICT

In the study of international organizations, structuralist approaches hold that these organizations reflect the underlying power in the relationships among States. They focus on the distribution of resources as the key determinant accounting for the results in the international scheme<sup>(5)</sup>. Furthermore, structuralist theories comprising neorealist and neo-Marxist versions of the hegemonic stability theory share the common vision that multilateral trade regimes are instruments of State power or class power. Thus, according to structuralist views, the GATT/WTO is seen as a multilateral trading system created to support and respond to the interests of most industrialized countries, such as the USA, European Union, Japan, Canada, to the detriment of developing countries<sup>(6)</sup>.

According to the neoliberal approach of political economy, the system includes rules that enable cooperation through information sharing, monitoring mechanisms, and low transaction costs, although for some, it also tends to preserve the interests of the leading countries establishing the system<sup>(7)</sup>.

Along the same lines, according to institutionalist approaches, the GATT/WTO represents an opportunity for developing countries to obtain more positive results in the international arena, thanks to the fact that this organization is strongly rule-oriented. Otherwise, in the absence of any rules, the results would be much more harmful to the interests of the least developed countries (LDCs)<sup>(8)</sup>. Furthermore, some views state that in asymmetrical relations, the weak are not always doomed to fail in their demands or, more specifically, that the outcome of international negotiations *can* be influenced by developing countries<sup>(9)</sup>.

Some more heterodox approaches refer to the pressure exercised by developed countries on developing ones. In the case of the WTO, this dynamics would involve a mix of rules and power, where power outweighs rules in critical times, such as at the closing of multilateral negotiation rounds<sup>(10)</sup>.

From a more juridical standpoint, in classical theory, when analyzing the relationship between law and power, it is stated that international law favors the *status quo* and, when that is not so, it becomes unrealistic and the threat of its violation arises<sup>(11)</sup>. However, others believe that the law plays a less relevant role in international relations, albeit not less important to the organization of international life<sup>(12)</sup>.

At the heart of this debate — regardless of the discipline involved — is the power relationship among states in international organizations, the North-South division of the

(5) Shadlen (2009, p. 1), *supra* note 1.

(6) M. Tanzimuddin Khan (2004, p. 13).

(7) M. Tanzimuddin Khan (2004, p. 16).

(8) "Bad rules are better than no rules... but they are still bad rules". Shadlen (2009, p. 6), *supra* note 1.

(9) I.W. Zartman; J.Z. Rubin (2002, p. 1).

(10) R. H. Steinberg (2002).

(11) H. Morghentau (2000, p. 79-85)

(12) M. Koskenniemi (2000, p. 28).



world, developed countries vs. developing countries and, consequently, the discussion around the flexibilities that LDCs must enjoy to make up for the asymmetry in international economic relations and to trigger their development strategies.

While there is no intention for this WTO-driven agenda — including S&D — to replace the countries' domestic development strategies<sup>(13)</sup>, the truth is that, on one hand, there is no level playing field at the WTO, and developing countries need flexibilities to at least negotiate under more equitable terms. On the other hand, it is worth noting that international trade is not an end in itself, but a means to improve the standards of living, as declared in the recitals to the agreement establishing the WTO.

Development is thus still present in the multilateral trading system and the task of analyzing issues that are the basis of the North-South conflict is equally current, as well as complex. For some authors, this discussion will prevail during part of the 21st century<sup>(14)</sup>, after the end of the Cold War and the world's East-West division: the First World became North and the Third World, South, while the Second World vanished (a few countries from the late Second World became part of the North and others, of the South). According to others, the increasing tensions on this issue are also a challenge to more classical views on international relations that are developed on the premise that cooperation leads to an increase in the overall well-being of the international community: in the North-South tension, interests are usually incompatible and cooperation rules are not applied<sup>(15)</sup>.

In this debate, the multilateral trading system still manifests very clear indications of the North-South conflict<sup>(16)</sup> and this is directly reflected on the hard struggle in relation to the Special and Differential Treatment (S&D) and the constant re-negotiation of its rules, as described below.

## SPECIAL AND DIFFERENTIAL TREATMENT UNDER GATT

At the beginning, developing countries on the basis of sovereign determination were considered equal partners in the multilateral trading system, at least under the 1948-1955 GATT<sup>(17)</sup>. The only provision available to developing countries was Article XVII, which enabled developing countries to derogate from their scheduled tariff commitments or implement non-tariff measures, such as quotas, in order to promote the setting up of certain industries in their territories, that is, the protection of infant industries<sup>(18)</sup>. From then on, the number of developing countries participating in the GATT increased, also increasing the pressure for more flexible rules accounting for the asymmetries of the system. Thus, the S&D is born as a result of the coordination of political efforts by

(13) As rightly mentioned by Kleen & Page in a comprehensive work on S&D (KLEEN, PAGE, 2004).

(14) See R. Reuveny; W. R. Thompson (2008).

(15) Shadlen (2009), *supra* note 1.

(16) D. Tussie (2010, to be published).

(17) E. Kessie (2000).

(18) A. Singh (2005).

developing countries in order to correct what they felt were inequalities in the post-Second World War system, understood as preferential treatment in favor of developing countries, in every aspect of their international economic relations<sup>(19)</sup>.

This development paradigm, pioneered by Latin America, India, Egypt and later supported by a wide array of countries from Asia and Africa, was based on the need to improve trading terms, reduce dependence on exportation of primary products, correct the volatility and imbalances in the balance of payments and industrialization by offering protection to infant industries and export subsidies, among other objectives<sup>(20)</sup>.

In the following years, several S&D provisions were introduced in the GATT. Firstly, through the amendment to Article XVIII in the GATT Review Session of 1954–55. The new item (article XVIII:B) offered flexibilities to developing countries so as to cope with difficulties in their balance of payments. Later on, in 1965, the S&D was also present in the inclusion of Part IV to GATT, exempting developing countries from the prohibition of applying subsidies to exports of manufactured goods and allowing for greater flexibility in the use of tariff protections. Additionally, many developing countries entered the GATT under Article XXVI, which enabled them to evade negotiation of consolidated tariffs as part of their accession agreements.

Flexibilities in relation to market access were deepened through the incorporation of the non-reciprocity provision (art. XXXVI:8) in Part IV of GATT in 1964. Furthermore, between 1966 and 1971, the Generalized System of Preferences — GSP and the protocol on trade-related negotiations among 16 developing countries were introduced in GATT, as waivers to article I (MFN).

In the Tokyo Round, which began in 1973, the efforts of developing countries to consolidate the special treatment in their favor resulted in the “Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries”, known as the “Enabling Clause”. The Enabling Clause comprises: a) the Generalized System of Preferences; b) Non-tariff measures in GATT instruments; c) Global or regional arrangements among developing countries, and d) Special treatment to LDC. The concept of special and differential treatment thus reached the core of the multilateral trading system.

However, at that time, developing countries started to perceive that the positive discrimination they received under S&D was being overshadowed by the increasing negative discrimination against their trade, so they took a tougher position<sup>(21)</sup>. The end of the

(19) UNCTAD (2000).

(20) UNCTAD (2000).

(21) Negative discrimination against developing countries was particularly apparent in relation to: voluntary restraint arrangements adopted directly against their most competitive exports; extension of free-trade agreements and custom unions among developed countries; increasing restrictions on textiles under the Multifiber Agreement; higher tariffs on products of exporting interest to developing countries in comparison with those of interest to developed countries; increasing application of anti-dumping and countervailing measures; and the use of the GSP as a pressure tool by developed countries, which — in the absence of more specific provisions — unilaterally “graded” the countries that would no longer receive GSP benefits (UNCTAD, 2000, p. 27; KESSIE, 2000, p. 9).

Tokyo Round was thus marked by great tension among the so-called “transatlantic powers” (USA and European Community-EC) and developing countries, members of the so-called “Informal Group of Developing Countries”. With the aid of UNCTAD, this group summarized its position on the Tokyo Round codes and set out to the battle, led by Argentina, Brazil, Egypt, India, and Yugoslavia.

Although the US and the EC were in full disagreement with the position of developing countries and with what they called the “UNCTADization” of the GATT — having even planned to bring back to life the conditional MFN clause or to leave the GATT and negotiate an agreement with the OECD — they decided to accept the position of developing countries to close the Round in the middle of security and defense considerations brought about by the Cold War<sup>(22)</sup>. Thus, the Tokyo Round closed in 1979 with voluntary codes, a compromise that reflected these tensions. Developing countries were thus able to defend their right not accept all rules, considered by industrialized countries as the clearest evidence of free riding<sup>(23)</sup>.

#### THE TURN TOWARDS THE WTO AND THE CURRENT DOHA ROUND

The Uruguay Round — UR began in a context where many developing countries were somewhat empowered by S&D flexibilities and, at the same time, they were watching for any discrimination against their trade. That is, they sought increased market access, taking a more cooperative stand in view of the promise of including agriculture in the negotiations, while they also intended to continue using S&D provisions. In the beginning, they did not intend to sign such agreements as TRIPs, TRIMs, or GATS. However, the course of the Round led to a very different outcome from that of the Tokyo Round.

To begin with, the UR was open to participation only for countries that were contracting parties under GATT or those that undertook to negotiate their accession during the Round<sup>(24)</sup>. Additionally, as the Round progressed, the Cold War was coming to an end and US negotiators no longer had to weigh security considerations in exercising their power to exert pressure on more reluctant countries. Furthermore, the crisis and adjustment many developing countries were undergoing caused them to see the UR as an opportunity to also obtain some benefit from the unilateral liberalization performed as a consequence of the structural adjustment programs required by international credit institutions as a condition for bailout. All too late, developing countries realized that agreement to adopt hard liberalization measures did not automatically imply the ability to exercise a decisive influence on the agenda and outcome of negotiations<sup>(25)</sup>.

(22) Steinberg (2002, p. 359), *supra* note 10; Krasner (1976), *supra* note 2.

(23) Even Argentina in the midst of an early neoliberal experiment that had drastically reduced tariffs neither bound these reductions nor signed the codes. For Brazil, enjoying then the so-called Brazilian miracle, signing the codes on export subsidies or government procurement, would have entailed great costs.

(24) UNCTAD (2000, p. 28), *supra* note 19.

(25) Tussie (2010), *supra* note 16.



In this context, the US and the EC deployed their coercive and bargaining power to close the round, resorting to the old scheme of threatening with draining the GATT. This time, the threat was made effective by means of a legal device in the text of the WTO Agreement. Article II of the Agreement establishes that all annexes (GATT of 1994, GATS, TRIPs, TRIMs, subsidy and anti-dumping arrangements, i.e. all of the so-called “multilateral trade agreements”) are part of the Agreement establishing the WTO and binding upon all members. This was the birth of the single undertaking. Additionally, the agreement establishes that the 1994 GATT is legally different from the 1947 GATT.

These devices were created to avoid free-riding or a “GATT à la carte” and draining the GATT 47, causing developing countries to accept the whole package because, once the WTO Agreement was signed and all other agreements were consequently accepted, the US and EC would deem their obligations extinguished in relation to the 1947 GATT<sup>(26)</sup>.

The impact of the Marrakech package on the development strategies was not adequately weighed. The outcome of the Uruguay Round was markedly uneven in favor of developed countries and dealt a hard blow to the S&D. There was no consensus among developing countries for the adoption of a general “umbrella” framework for S&D provisions, although there were not many chances of fighting for that either. Developing countries were at a crossroads — would they accept all the rules and obligations resulting from the negotiation or would they remain outside the organization?<sup>(27)</sup> As a matter of fact, the single undertaking resulted in causing developing countries and developed countries to assume very similar undertakings<sup>(28)</sup>, based on rules commonly biased in favor of developed countries.

The concept of S&D was changed<sup>(29)</sup>, its scope was restricted; it was a reflection of the poor willingness on the part of developed countries to continue granting special treatment, particularly to middle-income countries. This is evidenced by the express implementation of grading mechanisms, similar to what was already being unilaterally done with GSP beneficiaries. The focus was then shifted towards LDCs, as already contemplated in the general framework of the multilateral system, Article XI:2 of the WTO Agreement.

Clearly, the WTO’s evolution towards the inclusion of beyond-the-borders issues was not accompanied by a similar evolution of the instruments implementing the S&D concept. In this case, one had to make do with texts containing vague and ambiguous general S&D provisions, while only some specific provisions in certain agreements have binding effect, mostly those related to extended implementation terms. Thus, in the agreements currently in effect, the S&D provisions clearly establishing rights and

(26) Steinberg (2002), *supra* note 10.

(27) E. Tempone (2007).

(28) K. Fukasaku (2000).

(29) About the difference between S&D before and after the Uruguay Round, see Whalley (1999).



obligations enforceable against the dispute resolution system are those related to longer transition periods for implementation of obligations; and flexibility with some obligations and procedures, in addition to certain provisions on technical assistance<sup>(30)</sup>.

This is not enough if we consider the strong implications of multilateral trade rules on a developing economy, as there are no S&D provisions capable of overcoming the anti-development impact of several provisions in multilateral agreements, such as TRIPs, TRIMs, and the Agreement on Subsidies, which at times seem to invert the reasoning and grant special treatment to developed countries<sup>(31)</sup>.

In short, the main idea behind the new S&D seems to involve merely affording room for adjustment and implementation of the new, controversial rules; a far cry from a genuine concern for the development of LDCs.

However, the discussion on S&D, which seemed to be living on borrowed time, was growing in importance once again, in the years of implementation of the Marrakech agreements, when many developing countries became fully aware of how biased UR agreements were in favor of developed countries. On their part, the US and the European Union wanted to continue moving forward in the advancement of the Marrakech agreements, and with that in mind they proposed a new Round. Developing countries, on the other hand, unhappy with the outcome of the UR that did little for their development needs, accepted the offer, subject to prior exclusion of such issues as the environment and employment, and under the condition that the mandate of the new round should be as comprehensive as possible to include their interests and development needs<sup>(32)</sup>.

Thus, the Doha Development Round was launched in 2001 at the Doha Ministerial Conference. The Doha Declaration, paragraph 44, provided that S&D provisions are part of WTO Agreements and that particular attention will be paid to them, in an effort to reinforce them and make them more accurate, effective, and operational.

From then on, the S&D continued moving forward along two related paths. The first one involved the commitments already undertaken at the UR and their development, which in practice meant an important restriction in the S&D universe of application and their beneficiaries. The other path moved around the speeches and negotiations under way at the Doha Round. The following section will map those two paths.

Implementation of the special and differential treatment provisions in the specific agreements of the Uruguay Round: increasing restriction

(30) For considerations on the binding effect of S&DT provisions, see Kessie (2000), *supra* note 17, among others. Additionally, other authors have classified the S&DT provisions contained in the Marrakech agreements. See Fukusaku (2000), *supra* note 28; Hoekman (2005, p. 405-424); Kessie (2000), *supra* note 17; Kleen; Page (2004), *supra* note 13; Stevens, C. (2003). In turn, the WTO has also established a classification that will be described below.

(31) Some examples of the referred bias in the special treatment afforded to developed countries include quotas on textiles, agricultural subsidies, the agreement on subsidies (where the subsidies allowed are adequate for industrialized countries), or the restrictions on the competition policy allowed under the TRIPs Agreement. See Singh (2005), *supra* note 18.

(32) Steinberg (2002), *supra* note 10.

On one hand, this section will identify the situation of middle-income developing countries and LDCs<sup>(33)</sup>, in relation to the S&D provisions believed to have greater binding effect, that is to say, extended terms for agreement implementation and flexibility in their application. On the other hand, its purpose is to identify the S&D provisions under negotiation at the Doha Round.

To this end, a mapping will be conducted on the actual scope of the S&D in three of the Uruguay Round agreements: the Agreement on Subsidies and Countervailing Measures — SCM, the Agreement on Trade-Related Investment Measures — TRIMs, and the TRIPs Agreement. In addition, the agenda of the special session of the Committee on Trade and Development will be studied; this Committee is responsible for conducting the S&D negotiations in the round currently under way.

### THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES — SCM

Let us see a summary of the S&D situation in the Agreement on Subsidies from the effective date of the WTO Agreement to the present day<sup>(34)</sup>.

#### Box I — Differentiated terms and extensions for developing countries and LDCs under the SCM Agreement

SCM		Developing countries	LDC
Art. 27, paragraphs 1 and 2; Annex VII	Subsidies subject to use of national products	Adaptation period: <b>5 years, non-renewable.</b>	Adaptation period: <b>8 years, non-renewable.</b>
	Subsidies subject to exportation	<p>- Adaptation period: <b>8 years, renewable.</b></p> <p>- Some developing countries are not subject to this 8-year term until their GDP per capita reaches 1,000 dollars per annum<sup>(35)</sup>: Bolivia, Cameroon, Congo, Ivory Coast, Egypt, Philippines, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Dominican Republic, Senegal, Sri Lanka, and Zimbabwe. The 8-year term will then start to run in relation to them.</p>	Prohibition of use of those subsidies <b>shall not apply to LDCs</b> , as so designated by the United Nations.

(33) According to the list of the United Nations — UN; Economic and Social Council — ECOSOC.

(34) September 2009.

(35) The countries listed under b) above are included on the basis of the most recent data on GNP per inhabitant.

SCM		Developing countries	LDC
<b>Art. 27, paragraph 4</b>	<b>Term for application for extension</b>	December 31, 2001.	Not applicable
<b>Applications for extension or reservation of rights</b>		<ul style="list-style-type: none"> <li>- Extension: Antigua and Barbuda, Barbados, Belize, Colombia, Costa Rica, Dominica, El Salvador, Fiji, Granada, Guatemala, Jamaica, Jordan, Mauritius, Panama, Papua New Guinea, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Surinam, Thailand, and Uruguay.</li> <li>- Reservation of rights: Bolivia, Honduras, Kenya, and Sri Lanka.</li> </ul>	Not applicable
<b>Countries that were granted an extension for years 2003-2007 and benefited from the extension procedure, 2008-2012 period</b> [General Council Decision (WT/L/691)]		<ul style="list-style-type: none"> <li>- Antigua and Barbuda; Barbados; Belize; Costa Rica; Dominica; El Salvador; Fiji; Granada; Guatemala; Jamaica; Jordan; Mauritius; Panama; Papua New Guinea; Dominican Republic; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; and Uruguay.</li> <li>- Reservation of rights: Bolivia, Honduras, Kenya, and Sri Lanka.</li> </ul>	Not applicable

Source: own elaboration based on official WTO documents (<http://docsonline.wto.org>).  
The following observations may be made from the above mapping.

### 1. *EXTENSION OF TRANSITION PERIODS*

First, according to article 27 of the SCM Agreement, the transition period and its potential extension applied to all developing countries. Additionally, it established no conditions other than the deadline for submission of applications for extension (December 2001) and the review by the SCM Committee. Nevertheless, a very reduced group of countries requested an extension. Even fewer were those who obtained the requested extension and none of them is among those considered competitive developing countries. This is due to the fact that, during the Doha Ministerial Conference and supported by the Ministerial Declaration itself, the SCM Committee approved a document establishing the country profile and subsidy programs entitled to an extension (G/SCM/39), thus restricting the scope of article 27. In fact, conditions are so strict that they virtually exclude all middle-income developing countries. These conditions include: share of world merchandise export trade not greater than 0.10 per cent; Gross National Income of no more than US\$20 billion. Moreover, those which obtained an extension were almost all

the countries having free zone activity as their fundamental tool for the insertion in international trade. In brief, these are countries that would have no other alternative for positioning themselves in the international trade if it were not for certain programs aiding their exportations. Even in relation to that restricted group of countries, the General Council adopted a decision in 2007 (WT/L/691) establishing the maximum period — December 2015 — to continue adopting those subsidies.

## 2. RESERVATION OF RIGHTS

On the other hand, although it has established restricted conditions in comparison to article 27 of the SCM, the procedure approved by the Committee (G/SCM/39) declares, in paragraph 7, that its provisions shall not affect the rights set forth in the SCM Agreement, nor do they serve as precedent for any purposes. This paragraph might serve as a window enabling a request for extension by the developing countries that failed to meet the conditions required under that procedure. However, none of those countries, except Thailand, has submitted any request. In addition, in the subsequent procedure (WT/L/691), there is no reference to the undermining of the SCM Agreement and it only states that it makes no judgment about the rights of members making a reservation of rights, that is, Bolivia, Honduras, Kenya, and Sri Lanka.

It seems that these provisions worked more as a reservation of rights with a view to conducting future negotiations rather than as an exercisable right, while the current scenario does not seem to have changed for exercise of those rights, particularly by middle-income developing countries.

## THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES — TRIMs

The map of TRIMs looks as follows:

### Box II — Differentiated terms and extensions for developing countries and LCDs under the TRIMs Agreement

General Rule	<b>Notification obligation:</b> article 5, paragraph 1 and Decision WT/L/64: A term of <b>90 days</b> from the effective date of the WTO Agreement is granted to notify all TRIMs in effect that are not in conformity with the Agreement. For new members, there is a term of 90 days as from the date of acceptance of the WTO Agreement. (Decision WT/L/64)
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Rules for developing countries and LDCs	Transition period Article 5, paragraph 2:	Developing countries	LDC
		They shall eliminate the notified TRIMs in a term of <b>5 years</b> from the effective date of the WTO Agreement.	They shall eliminate the notified TRIMs in a term of <b>7 years</b> from the effective date of the WTO Agreement.
	Transition period extension Article 5, paragraph 3:	The transition period for developing countries may be extended, subject to the Goods Council's approval and fulfillment of certain requirements.	The transition period for LDCs may be extended, subject to the Goods Council's approval and fulfillment of certain requirements.
<b>Grant of extension</b>		<ul style="list-style-type: none"> <li>- Until May 2003: Romania</li> <li>- Until June 2003: The Philippines</li> <li>- Until December 2003: Argentina; Colombia; Malaysia; Mexico; Pakistan; Thailand.</li> </ul>	None
<b>Measures in favor of LDCs in Hong Kong</b> (Annex F of General Council Decision, WT/MIN(05/DEC, of 12/22/2005)		Not applicable	Ability to adopt measures not compatible with the Agreement, subject to prior notice, for a term of 6 years for already existing measures; 5 years for new measures.

Source: own elaboration based on official WTO documents (<http://docsonline.wto.org>)

### 1. THE DOHA MANDATE FOR TRIMs

This issue was the object of discussions in Doha in 2001 and the Decision on the matters and concerns regarding application (WT/MIN(01)/17) ratified the possibility to extend the transition period, particularly for LDCs. However, as may be seen in box II, no LDC requested an extension and, although some middle-income developing countries did so, the extension was granted only by the end of 2003. In 2004, Argentina, for example, submitted an application which was rejected.

Even in Doha, according to paragraph 12 of the Ministerial Declaration, pending matters — including proposals related to the TRIMs Agreement — would be made part of the work program. The main proposal on the matter is included in the working paper Job (01)152/Rev.1 and its content may be summarized as follows: 1. it is proposed that

developing countries have another opportunity to notify existing trade-related investment measures (TRIMs) and make use of a new transition period; 2. it is stated that extension rules should be properly amended and should be mandatory; 3. it is proposed that developing countries be exempted from obligations related to domestic content; and 4. it is stated that the TRIMs Agreement should be flexible enough for developing countries to be able to apply development policies.

In 2002, a report by the Committee Chairman to the General Council (G/L/588) opposed this proposal. According to the Chairman, the TRIMs Agreement already offered enough flexibility to respond to the concerns of developing countries.

Part of those issues is still on the agenda, due to the insistence of Brazil and India (G/C/W/428 G/TRIMS/W/25), which submitted proposals on development policies. To this date, these proposals are still being discussed, but they have not been submitted for formal consideration yet (G/TRIMS/M/20). According to subsequent reports, since 2005 it has been recommended that the issue be the object of political debate, given the disagreements among members, which prevent finding common ground at the technical level.

The African group also submitted a proposal in relation to TRIMs (TN/CTD/W/3/Rev.2), which considers such issues as balance of payments and transition periods. According to the reports by the Committee Chairman to the General Council, except for certain aspects concerning balance of payment issues, most of the proposal is not achieving consensus. It is recommended that discussions should continue.

The perspective for LDCs improved in Hong Kong. There, 5 provisions in favor of that country group were approved, thus enabling the adoption of measures incompatible with the agreement, renewable on prior request.

Regarding the other issues, and although there has been renewed enthusiasm — due to the drafting of revised proposals that were discussed — after Hong Kong, the agenda soon came to a standstill again, as evidenced by the 2006, 2007, and 2008 reports.

Thus, while the S&D issues that in practice favored developing countries continue to lack consensus for approval, the decisions that are in fact approved have been increasingly restrictive, including only LDCs. But, why is it that in a matter that is so important for development, as it is the case with investment measures, the great majority of developing countries has not even attempted to obtain an extension? And why is it that no LDC attempted to do so either before the Hong Kong Ministerial?

First of all, LDCs requested no extension for two reasons. On one hand, some were not significantly affected by the limitations imposed by the TRIMs<sup>(36)</sup>. As a matter of fact, in their current development stage, investment is welcome regardless of its origin or purpose. Besides, in practice, it is very difficult for those countries to impose limitations on such flows. That is, in general, LDCs have not made use of any investment measures incompatible with the TRIMs (domestic content requirement, limitations on imports, etc.) due to the absence of effective enforcement mechanisms, but particularly because of a lack of interest, as they do not have a domestic industrial capacity that would benefit from such measures. On the other hand, the countries that were in fact affected promoted the approval of measures in their favor, such as the Hong Kong decision.

(36) A. Di Caprio; A. Amsden (2004).

Secondly, middle-income developing countries continue to insist on the debate, but they have not appeared in large numbers to apply for extensions either. Brazil and India's proposals are more of an attempt to maintain the issue of development policies on the agenda, rather than a reaction by countries actually affected by the Agreement limitations.

To a great extent, this is due to the fact that virtually all of those countries are part of regional integration agreements, at least at the Free Trade Zone level, and that the domestic content requirement, considered as an incompatible measure under TRIMs rules, it is present in those integration processes as a regionally-established rule. Thus, the old domestic content requirement, now forbidden under TRIMs, has been turned into a powerful tool by the name of "regional content rules"<sup>(37)</sup>. The rules of origin are, in addition, compatible with WTO agreements, as they are necessary to certify the origin of products in transit in the "intrazone". From this standpoint, the TRIMs prohibition was to a great extent neutralized by regional commercial integration agreements, while LDCs benefited from provisional exemptions.

### THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS — TRIPS

In relation to intellectual property, let us analyze the following chart:

#### Box III — Differentiated terms for developing countries and the LCDs under the TRIPs Agreement

<b>General Rule</b>	<b>Transition period:</b> article 65, paragraph 1: No Member shall be under an obligation to apply the Agreement for a general term of <b>1 year</b> from the effective date of the WTO Agreement.		
Specific rules	Developing countries	<b>Transition period:</b> article 65, paragraph 1: <b>4 additional years.</b>	<b>Transition period for non-protected technology sectors:</b> article 65, paragraph 4: <b>additional period of 5 years.</b>
	LCDs: <b>Transition period:</b> article 66, paragraph 1: <b>10 additional years</b>		
Application for/ Grant of extension	Maldives Islands: - <b>Application for extension:</b> August 2004. - <b>Grant of extension:</b> until December 2007.		
Doha Mandate on extensions under TRIPs	<b>Paragraph 7 of the Declaration on the TRIPS Agreements and Public Health and Decision of the TRIPs Council (IP/C/25):</b> Member LCDs shall have no obligation in relation to pharmaceutical products for <b>Patents of Invention and Protection of Information not disclosed until January 1, 2016.</b>		

(37) M.T. Gutierrez-Haces (1998).



General Council Decision WT/L/ 478 (12.7.2002)	Extension of the transition period set forth in article 70(9) in relation to pharmaceutical products: Application of the obligations of Member <b>LDCs</b> under paragraph 9 of article 70 of the Agreement will be suspended in relation to <b>pharmaceutical products</b> until <b>January 1, 2016</b> .
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Source: own elaboration based on official WTO documents (<http://docsonline.wto.org>).

### 1. *TRANSITION PERIODS*

As may be seen, the S&D provisions contained in the TRIPs — except for the Doha initiative on the TRIPs Agreement and Public Health — were in practice the least effective ones. That is an indication of the extent of pressure exercised on developing countries to prevent them from extending their transition periods<sup>(38)</sup>. In fact, although both Argentina and Brazil — for example — could have exercised the right to use the additional four-year transition period [Article 65(4)] for some sectors, they waived this right. As a matter of fact, Maldives Islands were the only country applying for an extension.

### 2. *COMPULSORY LICENSES AND AMENDMENT TO TRIPs*

In addition to transition periods, the Doha Declaration on the TRIPs Agreement and Public Health introduced a subject that raised intense discussions among developing countries, LDCs, and developed countries. It is paragraph 6 of the Declaration, which is about the difficulties faced by the countries that are unable to make effective use of compulsory licenses because they lack manufacturing capacities in the pharmaceutical sector.

In September 2003, the TRIPs Committee issued a decision (WT/L/5402), that partially resolved the matter, granting exemptions for certain obligations under the Agreement for some countries to be able to export pharmaceutical products to those countries in need of capacity — or with insufficient capacity — to satisfy their domestic demand. This same decision provides for the drafting of an amendment to the TRIPs including that possibility, which was achieved in 2005 under Decision WT/L/641 amending the TRIPs Agreement and leaving its acceptance at members' discretion<sup>(39)</sup>. By early 2009, the protocol had been accepted by 21 countries, including Brazil and India.

As regards other S&D provisions, news are not that good. From all proposals submitted, it was only possible to move on with the drafting of one paragraph, similar to the African Group proposal on the difference between exclusive trade rights and patent rights.

## THE WTO DEBATE ON S&D

At the WTO, absent a framework agreement on S&D, progress and deliberations on the subject are fragmented into countless provisions under specific agreements, as well as into several negotiation proposals in special sessions of the Committee on Trade and

(38) Shadlen (2009), *supra* note 1.

(39) This alternative favors developing countries that have the capacity to export drugs, such as Brazil or India.

Development (CTD or Committee). This section will go over the issues under negotiation in the special session of the Committee.

Since February 2002, the CTD has been working hard on such issues as the review of S&D provisions in the specific agreements to construe them in a way that reinforces them and makes them more efficient; the review of proposals for a framework agreement on S&D, in addition to identifying those provisions that are mandatory and the consequences from conversion of the measures that are currently not binding into mandatory provisions, all of which should be in conformity with the mandate of paragraph 44 of the Doha Declaration and paragraph 12.1 of the Declaration on issues and concerns regarding the application of Doha<sup>(40)</sup>. Since then, the task involves submitting a report with recommendations to the General Council for a decision to be adopted on the matter, initially, no later than on March 31, 2003, pursuant to the mandate of paragraph 14 in the Doha Declaration.

On the basis of the review of the Committee's reports, we can observe that the Committee worked continuously up until 2008, but the terms were postponed as negotiations progressed in the round and the issue suffered several modifications that will be described below.

Before starting to work, upon the request of certain countries, the WTO Secretariat was instructed to disclose the information on the application of S&D provisions by the members, in order to facilitate the Committee's work<sup>(41)</sup>. Additionally, S&D provisions were divided into five groups, namely: provisions to increase trade opportunities through market access; those requiring that members safeguard the interests of developing countries; those allowing for certain flexibilities to developing countries in the application of rules and disciplines; those authorizing longer transition periods for developing countries and technical assistance provisions.

After this, discussions continued to deal with proposals for specific agreements and transversal and systemic proposals. The goal was to arrive at the Cancun Ministerial with recommendations to the General Council to be included in the text of the Declaration. In the sessions that followed until Cancun, the surveillance mechanism that would be responsible for monitoring compliance with S&D provisions in WTO agreements was included in the debate as a proposal of the African Group. In the last stage of sessions until December 2003, the Committee worked intensively under the chair of South African Faizel Ismail, who replaced Jamaican Ransford Smith. By the time of the Cancun Ministerial, there was a proposal to add Annex C to the Ministerial draft containing the proposals agreed upon. However, neither the Annex nor the text was adopted in the Ministerial. At that time, the attention focused on agriculture, market access in NAMA, cotton and the Singapore issues, thus leaving the discussion on S&D temporarily on hold, also expecting to find more common ground among countries.

The main disagreements until Cancun involved cross-cutting issues, such as S&D principles and objectives, the mandatory or non-mandatory nature of technical assistance, the enabling clause and graduation, differentiation among developing countries to allow for a one-, two-, or three-tier structure of rights and obligations, as well as the structure and scope of the surveillance mechanism.

(40) Available on: <[www.wto.org](http://www.wto.org)> Last accessed on: 9.5.2009.

(41) Document WT/COMTD/36.

After Cancun, upon the Chairman's initiative, works were resumed through specific questions to members on how to move forward with the S&D. There was disagreement, but not on the requirement that the July 2004 package should have a clear-cut development component.

According to the July package (WT/L/579), concerns on development and S&D provisions are part of the Doha Ministerial Declaration and WTO agreements, respectively. Furthermore, it recommended that progress should be made on pending proposals for provisions in specific agreements and should comprise all other pending works, including those in relation to transversal issues, the surveillance mechanism, and incorporation of the special and differential treatment to the WTO rules structure, also submitting the pertaining reports. It further recommends to all WTO bodies before which proposals on S&D have been submitted that they forthwith complete their review and also submit a report to that body, with clear recommendations for adoption of a decision, with a view to the Hong Kong Ministerial.

From then on, given the short term remaining until the Ministerial, the priority in search for consensus on pending issues turned to those involving LDCs, in addition to concluding the proposals in specific agreements to then arrive at the Hong Kong General Council with proposals. During that time, however, negotiations once again stumbled upon the following dilemma: transversal issues vs. specific issues. The priority afforded to LDCs also failed to remove conflict from the debate on these questions. Many developed countries were concerned about the automatic nature of concessions, also proposing that flexibilities should be temporary and be granted based on a jointly examined need. Furthermore, they believed the general exemptions and the mandatory nature of technical assistance were unacceptable.

On the eve of the Hong Kong Ministerial, there was no consensus except for some proposals on specific agreements. The proposals on S&D forwarded to other WTO bodies were not progressing either. A political decision was needed and the technical work seemed to have been exhausted, as diagnosed by some members. A decision was made to forward the draft text consented to by the majority, in addition to all minority proposals. A political decision was requested on the adoption of issues already agreed upon, the priority question of LDCs, and a clear directive on pending works.

In reply, ministers renewed the commitment to S&D at the Round, adopted five decisions in favor of LDCs, and instructed the CTD to complete works by the end of 2006. Undoubtedly, the most important element in the Declaration was the decision in favor of LDCs, as they moved beyond wishful thinking and the setting of to-be-extended terms.

Moreover, the Ministerial Declaration of Hong Kong indicated specific points on S&D with respect to developing countries, such as paragraph 24 of the document, or the principle of less than full reciprocity, as will be seen in the following section.

Afterward, the Committee's works, under the chair of Singapore ambassadors and then Thailand ambassadors, were initially focused on operationalizing decisions in favor of LDCs. In this sense, LDCs were particularly interested in moving on with the provisions on duty-free and quota-free market access and greater transparency in rules of origin.

Progress was made on the first issue and, by mid 2007, the CTD declared that several developed countries were already complying with the duty exemption in at least 97% of LDCs' exports. Pending work involved including the remaining 3%, which according to LDCs representatives it is the most relevant portion of their exports, and also causing developing countries that are able to do so to grant that benefit to least-developed ones. Regarding rules of origin, however, no such progress is observed. According to many members, that is an issue where at present progress on common standards and transparency criteria is unlikely, which leads to the conclusion that the same will happen at the CTD, where the matter is in fact deadlocked.

In the work on specific agreement provisions, by 2008, consensus had been achieved in only 6 out the 28 proposals on which there was preliminary agreement, from a total of 88 proposals submitted.

Finally, in relation to transversal issues, the only proposal that has survived along the years was that concerning the surveillance mechanism, although there is no comfortable margin of consensus on whether this mechanism should only deal with any provisions potentially approved after the start of Doha or whether it should consider all provisions, including the Marrakech agreements.

To offer a clearer idea on the restriction of the S&D agenda in CTD negotiations after Doha, below is a breakdown of the Committee's agenda by year, up until December 2008.

#### Box IV – Agenda of the Committee on Trade and Development in special session, from February 2002 to December 2008

2002-2003 (Cancun)	<p><b>Initial Doha Mandate:</b> review of S&amp;D provisions in specific agreements to reinforce them and make them more effective; review of proposals for a framework agreement on S&amp;D; identification of mandatory provisions and the consequences from conversion of the measures that are not currently binding into mandatory ones. To adopt decisions on the matter no later than March 31, 2003 (paragraphs 44 and 14 of the Doha Ministerial Declaration and paragraph 12.1 of the Declaration on issues and concerns related to the application of Doha).</p>
	<p><b>Issues discussed:</b></p> <ul style="list-style-type: none"> <li>- Proposals for provisions in specific agreements (28)</li> <li>- mandatory or non-mandatory nature of provisions and their consequences</li> <li>- principles and objectives of S&amp;D</li> <li>- difference among developing countries</li> <li>- surveillance mechanism</li> <li>- priority to LDCs</li> <li>- technical and financial assistance and building of capabilities</li> <li>- incorporation of the S&amp;D into the WTO's structure of rules</li> </ul>
2003-2005 (Hong Kong)	<p><b>Hong Kong Mandate<sup>(42)</sup>:</b> initial Doha mandate with extended terms, july 2004 package, and Ministerial Declaration of Hong Kong</p>

(42) This mandate includes the S&D decisions discussed at the CTD. This does not include the flexibilities in NAMA, Agriculture or Services, to name only a few.

2003-2005 (Hong Kong)	<b>Issues discussed:</b> <ul style="list-style-type: none"> <li>- proposals for provisions in specific agreements (16)</li> <li>- measures for duty-free and quota-free market access and rules of origin</li> <li>- proposals forwarded to other WTO bodies</li> <li>- surveillance mechanism</li> <li>- incorporation of the S&amp;D into the WTO's structure of rules</li> </ul>
2005-2008	<b>Current Mandate:</b> Hong Kong mandate, with extended terms <b>Issues discussed:</b> <ul style="list-style-type: none"> <li>- proposals for provisions in specific agreements (6)</li> <li>- surveillance mechanism</li> <li>- measures for duty-free and quota-free market access</li> </ul>

Source: own elaboration based on CTD reports from 2002 to 2008, available at: <<http://docsonline.wto.org>> and the WTO website: <[www.wto.org](http://www.wto.org)>.

Unsurprisingly, as an example of what has been going on with term renegotiation, the S&D is being restricted in the negotiations currently under way at the Committee on Trade and Development, in Doha. The only consensus achieved involved few proposals on specific agreement provisions, measures in favor of LDCs, and the general basis for a surveillance mechanism, while all other aspects that were being discussed at the beginning of the Round at the CTD seem to have been lost along the way.

There were some achievements, as is the case of specific measures for LDCs or the Protocol on TRIPs and public health. Additionally, there are certain relevant areas where the S&D is being negotiated for LDCs. In NAMA, for example, LDCs are exempt from making concessions, together with other groups of countries such as small and vulnerable economies and recently acceded members.

Nonetheless, that would seem little if compared to the negotiation agenda and the mandate at the start of the Round. Moreover, that type of particular measure does not contribute to the S&D cause because, firstly, the *laissez faire* policy for LDCs will not help them find a course for development unless it is coupled with technical assistance, technology transfer, and other substantial measures. Secondly, because it manages to divide the developing world into those already enjoying guaranteed preferences and other benefits — and which, consequently, reduce their demands — and the other countries that have been excluded from those benefits.

One final issue worth mentioning is that, at present, there is virtually no participation by some middle-income countries at the Committee on Trade and Development. And given that in the multilateral trading system nothing is lost, nothing is created, everything is transformed, the fact is that the search for flexibilities by those countries should be at a different level, under other names, as mentioned in the rules of regional origin and their relationship to TRIMs, for example.

Along these lines, the next section will identify the most relevant areas where middle-income countries are moving forward in the search for flexibilities in the Doha negotiations,



especially those most involved in the G-20 and NAMA 11, two coalitions reflecting two particularly interesting areas for these countries: Agriculture and NAMA (Non-Agricultural Market Access).

#### **FLEXIBILITIES FOR DEVELOPING COUNTRIES: *À LA CARTE* SPECIAL AND DIFFERENTIAL TREATMENT**

Much has been said about the participation of developing countries in the multilateral trading system. The first prevailing view asserts that developing countries participated in the GATT only to negotiate an exemption from their obligations, whether it be because they pursued import substitution industrialization and/or because they sought free-riding. In contrast, the second view believes that developing countries were some passive players under GATT, due to their lack of expertise or political representation to participate more fully.

Others claim that during the GATT, the participation of developing countries in the multilateral system was relatively reduced, whether because GATT was a system aimed at the interests of developed countries and developing countries did not believe it could serve their interests, or because they had a reduced presence in world trade — such reduced presence results in their exclusion from the system and *vice versa* — as indicated by the WTO itself<sup>(43)</sup>.

According to Wilkinson & Scott<sup>(44)</sup>, the problem is that those prevailing views do not fully account for the participation of developing countries in the GATT. As opposed to what is usually held, developing countries had an active involvement — as described in the first section of this paper; they made efforts to make rules appropriate to their situation and they did make concessions. Although it is true that their efforts were generally aimed at seeking more favorable treatment, this is due to the biased nature of GATT and of their underdeveloped status, rather than the mere search for free-riding.

Thus, as a starting point for this section, it is considered that there has been an increasing participation of developing countries in the multilateral trading system and that this participation intended to modify certain unfair rules of the multilateral trading system, in addition to help those countries move forward in their development strategies. In this context, developing countries adopted different strategies throughout the multilateral negotiations of GATT and, subsequently, of the WTO, which is clearly related to the fate of the Special and Differential Treatment in the course of multilateral system negotiations.

In an initial stage, when the first S&D provisions were introduced until their peak in the '70s, it could be said that developing countries showed a mostly confrontational strategy, promoting the creation of the UNCTAD and pushing for the creation of a new international economic order. In 1979, at the close of the Tokyo Round, the push to adopt the Enabling Clause showed a growing understanding of rules and a more consensus — concerned strategy.

(43) WTO (2000).

(44) R. Wilkinson; J. Scott (2008).



While certain progress was attained in making the GATT comprise more flexibilities to cater to their needs, even before the beginning of the Uruguay Round, developing countries started to realize the limitations of those achievements. As already described in the first section, developing countries started to perceive that the positive discrimination they were receiving under S&D was being outdone by an increasing negative discrimination against their trade, and they set out to seek market access, with the promise that agriculture would be included in the negotiations. Simultaneously, the UNCTAD was decreasing in relevance, as a consequence of the constant reluctance of developed countries to confer it any decision power in the international scenario<sup>(45)</sup>, while developing countries were searching for assistance to leave behind the '80s crisis in a context of marked change of paradigm towards neoliberalism.

With all these variables at stake, those countries adopted a more cooperative approach, participated in coalitions together with developed countries (Cairns Group) and accepted the undertakings and concessions package, also suffering a considerable amount of pressure by developed countries to close the Uruguay Round, as already noted in the first section.

The Marrakech agreements were gradually implemented, the debt on agriculture remained outstanding on the part of developed countries, and developing countries started to verify the high cost they were paying for the Uruguay Round. By the late '90s, a change of strategy was becoming increasingly necessary: on one hand, the strategies aimed at a change in the international order — through the rejection of the *status quo* and the creation of a counterhegemonic reality through UNCTAD — did not yield the expected results; on the other, the collaboration strategies did not yield the expected results either in the middle of the difficulties of the late '80s, the search for market access, and an attempt to obtain some benefit from unilateral opening.

Then, a new offensive by developing countries is observed intended to open a new negotiation round. Not a "Millennium Round", with a deepening of undertakings — as developed countries desired — but a "Development Round", with the leveling of the playing field and fulfillment of pending agriculture-related undertakings by developed countries. The Doha Development Round was launched in 2001, but the most remarkable change became apparent in 2003, in the Cancun Ministerial, with the creation of the G-20<sup>(46)</sup>.

The G-20 was born in 2003 out of a combination of factors. The feeling that the WTO was not satisfactorily assisting the interests of developing countries, particularly in agricultural issues; the visible gap existing between the Doha undertaking in agriculture and the draft under negotiation; the US and EU position to continue trying to get greater levels of undertaking by developing countries, while they submitted a framework proposal in agriculture that was not only restricted in relation to their own undertakings but also totally contrary to round objectives<sup>(47)</sup>.

(45) One of the devices used to that end involved having all of UNCTAD's initiatives be implemented through other already existing forums.

(46) The G-20 consists of: Argentina; Bolivia; Brazil; Chile; China; Cuba; Ecuador; Egypt; Philippines; Guatemala; India; Indonesia; Mexico; Nigeria; Pakistan; Paraguay; Peru; South Africa; Thailand; Tanzania; Uruguay; Venezuela; Zimbabwe.

(47) Uzquiza, L. G. (2009, p. 12).





It should be noted that the present coalitions (after the Doha Round) are rather different from the more confrontational coalitions of the '60s-'70s, like the G-77 for instance. While they maintain the substantial idea that developing countries share problems and needs that must be collectively addressed, coalitions such as the G-20 are not asking for the substitution of the WTO with another institution, they are not advancing on an alternative idea to the export-oriented insertion model, but what they promote is a change from within the WTO and not the construction of another regime<sup>(48)</sup>.

In general terms, the WTO suffered the distrust of developing countries, an institutional crisis leading to various studies on its reformation<sup>(49)</sup>, which represented an additional obstacle in the task of providing a proper response to the change in their members' balance of power. Brazil, India, Argentina, South Africa, among others, appeared as strong leaders in that coalition. As one of their major achievements, they imposed limitations on the US-EU bloc, which had dominated the multilateral trading system since the times of the GATT.

From the beginning, it was clear that the G-20 — as well as some other coalitions subsequently formed, such as NAMA 11<sup>(50)</sup> — was ready for the great battle: that of attaining a negotiation favoring their interests, or else they would not accept an agreement and would prevent the progress of negotiations and close the Round.

In this context, the S&D — in its more ample conception as a framework agreement — seems gradually less apt for those “graduated” countries (see second section)<sup>(51)</sup> and, though it would be a mistake to assume that the S&D will disappear from the agenda, it is clear that this issue is the WTO's great “moving target”<sup>(52)</sup>.

Thus, it is worth analyzing how those countries are being able to establish their demands in search for flexibility margins in future agreements, so as to understand the new S&D flexibility layout in relation to those countries.

To this end, it is necessary to understand the dynamics of the two main negotiations under way: agriculture and non-agricultural products. This is where the “great battle” of the WTO lies: finding a balance that is acceptable to everyone between agriculture (domestic support and market access) and the NAMA (Non-Agricultural Market Access). All other negotiations in this round are in the waiting line, advancing in minor issues, making no decisions, executing no agreements, waiting for these negotiations to come to an end.

Negotiation of the flexibilities of these modalities responds to a liberalization criterion for “less than full reciprocity”, to respond to the more general requirements of the Development Round, and the balance between agriculture and NAMA, set forth in

(48) Tussie (2010), *supra* note 16, p. 18.

(49) See the Sutherland Report requested by the WTO and the comments in relation to, quoted by Tempone (2007), *supra* note 27.

(50) NAMA 11 members are: Argentina; Brazil; Egypt; Philippines; India; Indonesia; Namibia; Bolivarian Republic of Venezuela; South Africa; Tunisia.

(51) In fact, at the Committee on Trade and Development, those countries are required to grant special treatment to LDCs.

(52) Tórtora (2003, p. 7).

paragraph 24 of Hong Kong, as a general rule. As a specific rule, each country or group of countries is negotiating its particular flexibilities.

In NAMA, there are not many countries that will be applying the general tariff reduction (the so-called “Swiss formula” with coefficients). Most member countries, especially developing countries, are part of some exception, whether it be because they are LDCs, small and vulnerable economies, recently acceded members (RAMs), transition economies, highly indebted countries, small islands, landlocked countries, etc.

Among the countries that will be applying the formula, many are negotiating flexibilities in addition to the general ones deriving from the general rule on less than full reciprocity and balance with agriculture. MERCOSUR, for instance, negotiated an additional flexibility consisting of a list of exceptions that will not be included in the tariff reduction.

While the current draft for NAMA has been accepted by Brazil (with inclusion of the additional flexibility for MERCOSUR) and India (that requested no additional flexibility), Argentina and South Africa are carrying on with negotiations.

Argentina believes that the current draft does not satisfy the general requirements of less than full reciprocity and balance between agriculture and NAMA, and is negotiating a clause for its exceptional position.

In turn, South Africa points out that in the Uruguay Round it made concessions in NAMA equivalent to those of a developed country and, therefore, it should be allowed to offer a lesser deepening of its undertakings under this modality, and that is why its particular case is still subject to negotiation.

Some other groups of developing countries are also trying to adapt to this scenario, like Peru, Colombia, Ecuador, or Costa Rica; these are small economies, although they do not fall into the “small and vulnerable” category and fear that preferences might be undermined by the special flexibilities to this type of countries. Additionally, countries like Paraguay are actively demanding special flexibilities to landlocked countries.

In agriculture, the situation is somewhat different. In the G-20 there are at least two groups: offensive net exporting countries — led by Brazil — and defensive net importing countries — led by India and China.

Countries like Brazil and Argentina want to deepen the undertakings on domestic support (the greatest obstacle being the United States) as well as on market access measures (the greatest obstacle being the European Union), while India is more interested in eliminating domestic support measures because there are many obstacles for access to its market.

In order to keep the common denominator in the G-20 and reconcile all interests involved<sup>(53)</sup>, these countries have focused their efforts against domestic support measures, letting the US be the country focusing on attempting to reduce the obstacles to market access, particularly for European markets.

(53) As a matter of fact, Brazil and India conducted a thorough review on their agricultural profiles and proposals to analyze the compatibility of their positions, prior to G-20 formation. See Uzquiza (2009, p. 15), *supra* note 47.

In this context, it appears that negotiations are bound to conclude, and there will be certain flexibilities tailored to the needs of developing countries, while there are still doubts about whether the package would be approved by the United States and the European Union. Is it possible for the USA to obtain negotiating mandate in the middle of such a deep crisis? Could this round, in the short term, reach consensus between USA and EU with regard to agricultural subsidies — the main problem for USA — and barriers to market access — the main problem for EU?

## CONCLUSIONS

This paper was intended to accomplish two closely related objectives. On one hand, to identify how S&D has been dealt with in the multilateral system, from its inception under GATT to the present negotiations in Doha. On the other, to identify how middle-income developing countries like Brazil, Argentina, India, and South Africa have positioned themselves in this context, where S&D is being increasingly considered an issue for LDCs.

The heart of this debate is the power relationship among states at international organizations, the world's division into North-South, into developed countries vs. developing countries, as well as the increasing fragmentation of developing countries. These issues are reflected on the debate around the flexibilities that LDCs must have to make up for the asymmetry in international economic relations and to have room to promote development strategies.

The theoretical views on this matter range from structuralist approaches — according to which the GATT/WTO is seen as a multilateral trading system created to support and respond to the interests of most industrialized countries, such as the USA, the European Union, Japan, Canada, to the detriment of developing countries<sup>(54)</sup> — to institutionalist views, according to which the GATT/WTO represents an opportunity for developing countries to obtain more favorable results in the international scenario, thanks to the fact that the WTO is strongly rule-oriented<sup>(55)</sup>.

Between those two views, there is a series or more heterodox approaches claiming that in asymmetrical relationships, the weak are not always doomed to fail in their demands and that the outcome of international negotiations *can* be influenced by developing countries<sup>(56)</sup>. Additionally, others state that the WTO uses a mixed dynamics of rules and power, where power outweighs rules in critical times, such as at the closing of multilateral negotiation rounds<sup>(57)</sup>.

Mixed views are quite appropriate to understand the situation of the Special and Differential Treatment at the WTO. It can be observed that, on one hand, the S&D is being restricted to the so-called middle-income countries, while on the other, those countries continue seeking and obtaining flexibilities they deem necessary in the multilateral trading

(54) Tanzimuddin Khan (2004, p. 13), *supra* note 6.

(55) Shadlen (2009, p. 6), *supra* note 1.

(56) I. W. Zartman; J. Z. Rubin (2002), *supra* note 9; Page (2002, p. 1).

(57) Steinberg (2002), *supra* note 10.

system according to their development perspective, with some amount of help from the WTO's own rules.

On one hand, the S&D provisions of the Uruguay Round have had an increasingly restrictive interpretation and did not have the expected impact on the development agenda. In the agreements analyzed, it is possible to see a tendency to restrict, in practice, those provisions to LDCs and, to a lesser extent, to other developing countries in a less advantageous situation, excluding the more developed developing countries of middle-level income. Moreover, in the negotiations currently under way, the initial S&D agenda at the Committee on Trade and Development (in special session) when the Doha Round was launched was ample and comprehensive — mandatory or non-mandatory nature of provisions and their consequences; S&D principles and objectives; technical and financial assistance and training of capacities; S&D incorporation into WTO rule structure. Today, this agenda is limited to implementation of measures in favor of LDCs, a surveillance mechanism, and some S&D proposals for specific agreements.

Many of the developing countries that were being excluded from S&D benefits during the implementation of the Marrakech agreements started fighting for specific flexibilities on each of the issues of critical importance to them, such as agriculture and NAMA, and thus obtain certain flexibilities matching their respective developing country profiles.

While attempting to attain those results, certain substantial issues in the present negotiations of the Doha Round were unveiled. The negotiations are a reflection of the change in the world's balance of power and the increasing fragmentation of the developing world. The WTO, to a large extent, reflects these changes. In fact, it is the first one in doing it, mostly given that it is the most transparent of all multilateral organizations, and it is also the most accountable to its members.

However, the WTO is only the canary in the coal mine that announces the lack of oxygen: it shows how multilateral organizations are obsolete in this transition phase to a new global scenario. The times when transatlantic powers bilaterally set the agenda in multilateral trading system are gone, and the limit comes from the coalitions of developing countries or their use of the Dispute Settlement Mechanism. Middle-income and emerging countries already have the ability to block negotiations and impose certain limitations on the US-EU bloc, which had dominated the main decisions of the multilateral trading system since the times of the GATT.

Nevertheless, that power is not enough yet to achieve a substantial reformation of multilateral system rules, even though that does not seem to be the priority objective of those countries either, at least for the time being. Among them, a more pragmatic view prevails — confrontation from within the system, an attempt to obtain specific flexibilities, in view of the increasing restriction to the provisions identified as “S&D” and a strong offensive to also achieve more undertakings by developed countries.

At times, this round seems biased to large and medium players. That is also reflected on the way in which the S&D was managed in relation to LDCs and all the other subsets of countries, such as small and vulnerable economies, small islands, landlocked countries, and the like. The “laissez-faire” approach is unanimously considered as a measure intended

to cause those countries to give their consent to the round and be silenced in their demands, while interest is focused somewhere else — on large markets.

In the middle of these considerations, there does not seem to be any more room for a grand or over-arching framework agreement on S&D, including more binding provisions, particularly for those developing countries that do not fall into the least developed. The most likely outcome from all of the above will be certain tailor-made flexibilities, some sort of variable-geometry S&D approach, on a case-by-case basis. To a certain extent, that would mean undoing the road for a single undertaking at the WTO, agreed upon at the Uruguay Round, adapting the system to the various needs and capacities of its members. Perhaps that unravelling may ease the negotiations but may not be enough in the realm of trade rules for development.

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